

***United States Court of Appeals  
for the Second Circuit***



**AMICUS BRIEF**



74-2191  
IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

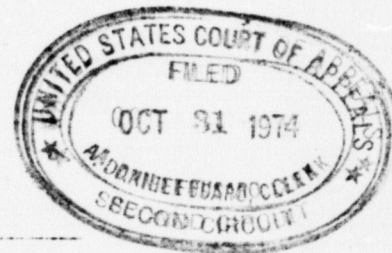
-----  
COMMUNICATIONS WORKERS OF AMERICA,  
AFL-CIO; ESTHER SKIPPER, individually  
and on behalf of all similarly situated  
Non-Supervisory Female Employees of  
American Telephone and Telegraph  
Company, Long Lines Division,

Plaintiff,

-against-

AMERICAN TELEPHONE AND TELEGRAPH  
COMPANY, LONG LINES DIVISION,

Defendant.



-----  
BRIEF AMICUS CURIAE OF THE  
NEW YORK CIVIL LIBERTIES UNION  
-----

Eve Cary  
New York Civil Liberties Union  
84 Fifth Avenue  
New York, New York 10011

Attorney for Amicus Curiae

Ruth Bader Ginsburg  
Melvin L. Wulf  
Kathleen Peratis  
Wendy Webster Williams

of counsel

## SUBJECT INDEX

	PAGE
Interest of <u>Amici Curiae</u>	1
Issues presented	3
Statement of the case	3
Statement of Facts	4

INTRODUCTION	5
--------------	---

### II

GENERAL ELECTRIC COMPANY'S DENIAL OF SICKNESS AND ACCIDENT BENEFITS TO WOMEN WORKERS DISABLED BY PREGNANCY-RELATED ILLNESS OR INJURY, WHEN IT PAYS SUCH BENEFITS TO ALL OTHER DISABLED WORKERS, CONSTITUTES SEX DISCRIMINATION IN VIOLATION OF TITLE VII.	8
---	---

A. A POLICY WHICH COVERS MALE WORKERS FOR ALL DISABILITIES SUFFERED BY THEM BUT DOES NOT COVER FEMALE WORKERS FOR ALL DISABILITIES DISCRIMINATES ON THE BASIS OF SEX.	8
---	---

B. THE EFFECT OF PREGNANCY DISCRIMINATION IN THE LABOR MARKET AFFECTS THE STATUS OF ALL WOMEN WORKERS BY DISCOURAGING LABOR MARKET PARTICIPATION OF WOMEN OF CHILDBEARING AGE, LIMITING EMPLOYMENT OPPORTUNITIES FOR WOMEN, AND DEPRESSING WOMEN'S WAGES.	10
---	----

C. TITLE VII IS A COMPREHENSIVE STATUTORY SCHEME INTENDED TO PROSCRIBE PRACTICES WHICH ARE "FAIR IN FORM, BUT DISCRIMINATORY IN OPERATION."	16
---	----

D. <u>GEDULDIG V. AJELLO</u> HAS NO BEARING ON THE CASE AT BAR.	26
---	----

E. THE EEOC'S INTERPRETATION OF TITLE VII,  
EMBODIED IN ITS PREGNANCY AND CHILDBIRTH  
GUIDELINES, IS ENTITLED TO GREAT DEFERENCE. 33

1. There is no specific legislative  
intent contravening the EEOC Guidelines. 35

2. The EEOC's guideline enhances the  
general purposes and policies of Title VII. 37

3. The fact that the guideline was not  
issued contemporaneously with the Act is  
irrelevant to its validity. 40

F. THE CONGRESSIONAL HISTORY OF THE EQUAL RIGHTS  
AMENDMENT HAS NO BEARING ON THE INTENT OF TITLE  
VII, BUT IF IT DID IT WOULD SUPPORT THE COVERAGE  
OF EMPLOYER PREGNANCY RULES. 47

CONCLUSION 52

# TABLE OF AUTHORITIES

## CASES

## PAGE

<u>Bartmess v. Drewrys U.S.A., Inc.</u> , 444 F. 2d 1186 (7th Cir.), <u>cert. denied</u> , 404 U.S. 939 (1971).	34, 40, 42
<u>Berg v. Richmond Unified School District</u> , App. No. 74-1457 (9th Cir. 1974) (appeal pending).	39
<u>Brown v. Gaston County Dyeing Machinery Co.</u> , 457 F. 2d 1377 (9th Cir.), <u>cert. denied</u> , 409 U.S. 982 (1972).	20
<u>Chance v. Board of Examiners</u> , 458 F. 2d 1167 (2d Cir. 1972).	27, 30
<u>Cheatwood v. South Central Bell Telephone and Telegraph Co.</u> , 303 F. Supp. 754 (M.D. Ala. 1969).	15
<u>City of Petersburg v. United States</u> , 354 F. Supp. 1021 (D.D.C. 1972).	25
<u>City of Richmond v. United States</u> , C.A. No. 1718-72 (D.D.C. 1972)	25
<u>Cleveland Board of Education v. LaFleur</u> , 414 U.S. 632 (1974).	2
<u>Dessenberg v. American Metal Forming Co.</u> , 6 E.P.D. ¶ 8813 (N.D. Ohio 1974).	39
<u>Diaz v. Pan Am. World Airways, Inc.</u> , 442 F. 2d 385 (5th Cir.), <u>cert. denied</u> , 404 U.S. 950 (1971).	18, 36
<u>Espinoza v. Farah Mfg. Co.</u> , 414 U.S. 86 (1973).	18, 33, 35
<u>Frontiero v. Richardson</u> , 411 U.S. 677 (1973).	31
<u>Gaston County v. United States</u> , 395 U.S. 285 (1969).	30

	PAGE
<u>Rosen v. Public Service Electric &amp; Gas Co.,</u> 477 F. 2d 90 (3d Cir. 1973)	20
<u>Rosenfeld v. Southern Pac. Co.,</u> 444 F. 2d 1219 (9th Cir. 1971).	42
<u>Sprogis v. United Airlines, Inc.,</u> 444 F. 2d 1194 (1971).	19
<u>Struck v. Secretary of Defense,</u> 460 F. 2d 1372 (9th Cir. 1971, 1972), <u>cert. granted,</u> 409 U.S. 947 (1972).	2
<u>Udall v. Tallman,</u> 380 U.S. 1 (1965).	34
<u>Unemployment Comm. v. Aragon,</u> 329 U.S. 143 (1946).	34
<u>United States v. Chesterfield County School Board,</u> 484 F. 2d 70 (4th Cir. 1973).	28
<u>United States v. Darby,</u> 312 U.S. 100 (1941).	22
<u>United States v. Montgomery County Board of Education,</u> 395 U.S. 225 (1969).	28
<u>Wetzel v. Liberty Mutual Ins. Co.,</u> 372 F. Supp. 1146 (W.D. Pa. 1974).	32, 39
<u>Whitcomb v. Chavis,</u> 403 U.S. 124 (1971).	29
<u>White v. Regester,</u> 412 U.S. 755 (1973).	29
<u>Wright v. Emporia,</u> 407 U.S. 451 (1972).	28
 <u>CONSTITUTIONS</u>	
Thirteenth amendment to the United States Constitution	23
Fourteenth amendment to the United States Constitution	

# CASES

## PAGE

<u>Geduldig v. Aiello</u> , ____ U.S. ____, 94 S. Ct. 2485 (1974).	2,3,4,9, 26, 32, 47
<u>Gilbert v. General Electric</u> , 375 F. Supp. 367 (E.D. Va. 1974).	9, 35
<u>Gomillion v. Lightfoot</u> , 364 U.S. 339 (1960)	29
<u>Griggs v. Duke Power Co.</u> , 401 U.S. 424 (1971)	16,17,18, 20,30,33
<u>Guinn v. United States</u> , 238 U.S. 347 (1915).	30
<u>Heart of Atlanta Motel, Inc. v. United States</u> , 379 U.S. 241 (1964)	22
<u>Holt v. City of Richmond</u> , 459 F. 2d 1093 (4th Cir. 1972).	25
<u>Hutchison v. Lake Oswego School District No.7</u> , 374 F. Supp. 1056 (D. Ore. 1974)	39
<u>Jones v. Alfred H. Mayer Co.</u> , 392 U.S. 409 (1968)	23
<u>Katzenbach v. McClung</u> , 379 U.S. 294 (1964).	22
<u>Katzenbach v. Morgan</u> , 384 U.S. 641 (1966).	22,23
<u>Keyes v. School District No.1</u> , 413 U.S. 189 (1973).	27,28
<u>King v. Laborers Int'l. Union</u> , 443 F. 2d 273 (6th Cir. 1971)	20
<u>Lane v. Wilson</u> , 307 U.S. 268 (1939)	30

<u>Lassiter v. Northampton County Bd. of Election,</u> 360 U.S. 45 (1959).	24
<u>Lillo v. Plymouth Local Bd. of Education,</u> ____ F. Supp.____, 8 E.P.D. ¶ 9510 (D.C. N.D. Ohio 1974).	39
<u>Marquez v. Omaha District Sales Office, Ford</u> <u>Division,</u> 440 F. 2d 1157 (8th Cir. 1971).	20
<u>McCulloch v. Maryland,</u> 17 U.S. (4 Wheat) 316 (1819).	23
<u>McLaughlin v. Florida,</u> 379 U.S. 184 (1964).	49
<u>Muller v. Oregon,</u> 208 U.S. 412 (1908).	42
<u>N.L.R.B. v. Fainblatt,</u> 306 U.S. 601 (1939).	22
<u>N.L.R.B. v. Jones &amp; Laughlin S. Corp.,</u> 301 U.S. 1 (1937).	21
<u>Newman v. Delta Air Lines, Inc.,</u> 374 F. Supp. 238 (N.D. Ga. 1973).	39
<u>Oregon v. Mitchell,</u> 400 U.S. 112 (1970).	23
<u>Palmer v. Thompson,</u> 403 U.S. 217 (1971).	28
<u>Phillips v. Martin Marietta Corp.,</u> 400 U.S. 542 (1971).	9
<u>Red Lion Broadcasting Co. v. Federal Communications</u> <u>Commission,</u> 395 U.S. 367 (1969).	34
<u>Reed v. Reed,</u> 404 U.S. 71 (1971).	29, 28
<u>Robinson v. Lorillard Corp.,</u> 444 F. 2d 791 (4th Cir.), <u>cert. dismissed,</u> 404 U.S. 1006 (1971).	20, 30

## STATUTES AND REGULATIONS

EEOC Guidelines on Discrimination Because of Sex ("Guidelines"), 29 C.F.R. § 1604.10, §§ 1604.1(a) (1) (i) and (ii)	3,6,7,33 12
Executive Order 11246	41,46
Proposed Regulations to Title IX of the Higher Education Act of 1972, 20 U.S.C. § 1681 <u>et seq.</u>	46
Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e <u>et seq.</u>	4,37
Voting Rights Act of 1965	23,26
42 U.S.C. § 1973c	25

## LEGISLATIVE MATERIALS

110 Cong. Rec. 1528, 7207-7212, 8452-8456.	21,38
110 Cong. Rec. H2577-2584 (1964).	36
118 Cong. Rec. S9083 (1972).	48
118 Cong. Rec. S9097 (1972).	48
H.R. Rep. No. 92-238, 92d Cong., 2d Sess. 8 (1972).	17,43
H.R. Rep. No. 92-359, 92d Cong., 1st Sess. 6 (1971).	48
Report on the Senate Committee on Labor and Public Welfare, Senate Report No. 92-415, 92d Con., 1st Sess. 5.	43
S. Rep. No. 92-689, 92d Cong. 2d Sess. 11 (1972).	48

## BOOKS AND ARTICLES

- Brown, Emerson, Falk and Freedman,  
"The Equal Rights Amendment: A Constitutional  
Basis for Equal Rights for Women," 80 Yale  
L.J. 871 (1971) 48,49,51
- Cary, "Pregnancy Without Penalty," 1 Civ.  
Lib. Rev. 31 (1974) 14
- Comment, "Love's Labors Lost: New Conceptions  
of Maternity Leaves," 7 Harv. Civ. Rights-  
Civ. Lib. Rev. 260 (1972) 14,45
- Cooper, "Equal Employment Law Today," 5  
Colum. Human Rts. L. Rev. 263 (1973) 20
- Hayden, "Punishing Pregnancy," (ACLU Report 1973) 14
- Koontz, "Childbirth and Child Rearing Leave:  
Job Related Benefits," 17 N.Y.L. Forum 480 (1971) 14,45
- Testimony of Catherine East, Executive Secretary,  
Citizen's Advisory Council on the Status of Women,  
Joint Appendix, Vol. II 14
- United States Bureau of the Census, "Female Family  
Heads," Series P.23, Report #50 (1974) 11
- United States Dept. of Labor, Women's Bureau,  
"Economic Report of the President," (1973) 11
- United States Dept. of Labor, Women's Bureau,  
"Why Women Work," (Rev. ed. 1972) 11

MISCELLANEOUS

CCH EEOC Decisions (1973)

§6125	44
§6084	44
§6170	44
§6184	44
§6221	45
§6412	45

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x

COMMUNICATIONS WORKERS OF	:
AMERICA, AFL-CIO, ESTHER SKIPPER,	:
individually and on behalf of all	:
similarly situated Non-Supervisory	:
Female Employees of the American	:
Telephone and Telegraph Company,	:
Long Lines Department,	:
Plaintiffs,	:
-against-	:
AMERICAN TELEPHONE AND TELEGRAPH	:
COMPANY, LONG LINES DEPARTMENT,	:
Defendant.	:

-----x

---

BRIEF AMICUS CURIAE OF THE  
NEW YORK CIVIL LIBERTIES UNION

---

Interest of Amicus Curiae

The New York Civil Liberties Union (hereinafter NYCLU) is the New York State affiliate of the American Civil Liberties Union (hereinafter ACLU), a nationwide nonpartisan organization of over 250,000 members dedicated to defending the right of all persons to equal treatment under the law. Recognizing that discrimination against women is a pervasive problem at all levels of society, public and private, the ACLU and the NYCLU have

each established a Women's Rights Project to work towards the elimination of gender-based discrimination.

Lawyers for the ACLU and NYCLU have participated in a number of cases involving government and employer rules subjecting women who bear children to disadvantageous treatment. The ACLU acted as *amicus curiae* in Cohen v. Chesterfield County School Board and Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), which struck down mandatory maternity leave for pregnant school teachers on due process grounds, and Gelduldig v. Aiello, \_\_\_ U.S. \_\_\_, 94 S.Ct. 2485 (1974), which upheld the denial, against a fourteenth amendment challenge, of state disability benefits to women disabled by childbirth. Also, lawyers for the ACLU were counsel in Struck v. Secretary of Defense, 461 F.2d 1372 (9th Cir. 1971, 1972), cert. granted, 409 U.S. 947 (1972) (judgment vacated and remanded for consideration of mootness), which challenged the discharge of Captain Struck for pregnancy.

The NYCLU participates in this case as *amicus curiae* because it views the achievement of even-handed treatment of pregnant women and women suffering pregnancy-related disabilities as basic to their efforts to achieve

equality for working women.

### Questions Presented

1. Whether an employer-established temporary disability plan which pays benefits for all disabilities except those arising from pregnancy violates Title VII of the Civil Rights Act of 1964.

2. Whether the court should follow the Equal Employment Opportunity Commission's (hereinafter EEOC) Guidelines on Employment Policies Relating to Pregnancy and Childbirth, 29 C.F.R. §1604.10 in its interpretation of Title VII.

### Statement of the Case

This case is before this Court on an Order of the United States District Court for the Southern District of New York (Knapp, J.) to certify the question whether the Supreme Court's holding in Geduldig v. Aiello, \_\_\_ U.S. \_\_\_, 94 S. Ct. 2485 (1974), establishes that differing treatment of pregnancy-related from other disabilities in itself constitutes sex discrimination within the prohibition either of Title VII or of the

Fourteenth Amendment.

Statement of the Facts

The American Telephone and Telegraph Company (AT&T) has established a program providing for payments to employees who are absent by reason of disability, regardless of whether that disability is caused by sickness, accident or otherwise. Providing that the absence due to disability is eight or more days in duration, American Telephone and Telegraph's benefits cover disabilities arising from cosmetic surgery, vasectomies, menopause, cures for alcoholism, cirrhosis of the liver, lung cancer, skydiving accidents, attempted suicide, and prostate disorders. The only disability of eight or more days duration not covered by American Telephone and Telegraph's Disability Plan is disability due to normal pregnancy.

American Telephone and Telegraph employs approximately 10,000 female employees, of whom an estimated 6% or 615 were absent due to pregnancy within a one-year period. The exclusion from the Plan for these women is not specified in the Plan but is the result of the policy and practice of American Telephone and Telegraph.

The plans are administered by the company through employee benefits committees whose members are officers of the company and which have apparently never included a women member.

Amicus urges that the facts herein show discrimination by sex in a term and condition of employment prohibited by Title VII of the 1964 Civil Rights Act. The decision of the Supreme Court in Geduldig v. Aiello, supra, a case brought under the Fourteenth Amendment, is not dispositive of a similar case brought under Title VII.

#### Introduction

Pregnancy and childbirth are disabilities not rationally distinguishable from other disabilities. This premise is fully consistent with modern medical knowledge. See Policy Statement on Pregnancy-related Disabilities, American College of Obstetricians and Gynecologists, adopted March 2, 1974, quoted in Geduldig v. Aiello, \_\_\_\_\_ U.S. \_\_\_\_\_, 94 S. Ct. 2485, 2494 N.Y. (1974) (dissenting opinion of Brennan, J.). Because pregnancy-related disabilities are necessarily sex-linked, AT&T's Plan, which covers all disabilities except those arising from

pregnancy and childbirth constitutes illegal sex discrimination under Title VII.

A finding of a Title VII violation can be amply supported in this case. Title VII itself, rooted in Congress' attempt to eliminate labor market inequality for certain disadvantaged groups in the interests of our national commerce, fully warrants reaching this determination. Moreover, the court can be guided by the EEOC's authoritative interpretation of the specific requirements mandated by congressional intent in this area. EEOC's Sex Discrimination Guidelines, issued March 30, 1972, provide:

(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of Title VII.

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual

of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.

29 C.F.R. Sec. 1604.10  
37 Fed. Reg. 6837 (1972)

Defendant has violated these guidelines.

For the reasons stated below, amicus contends that Defendant should be held to have violated Title VII even in the absence of the EEOC's Guideline. Moreover, the Guideline itself is fully consistent with and indeed impelled by the legislative history and general purposes of Title VII. Violation of the Guideline is thus a clear signal of statutory violation. For these reasons, amici respectfully submit that the exclusion of pregnancy and childbirth disabilities be declared in violation of Title VII.

## ARGUMENT

POINT I. AMERICAN TELEPHONE AND TELEGRAPH'S DENIAL OF SICKNESS AND ACCIDENT BENEFITS TO WOMEN WORKERS DISABLED BY PREGNANCY-RELATED ILLNESS OR INJURY, WHEN IT PAYS SUCH BENEFITS TO ALL OTHER DISABLED WORKERS, CONSTITUTES SEX DISCRIMINATION IN VIOLATION OF TITLE VII.

A. A policy Which Covers Male Workers For All Disabilities Suffered By Them But Does Not Cover Female Workers For All Their Disabilities Discriminates On The Basis of Sex

American Telephone and Telegraph's Benefit Plan compensates every form of disability--voluntary, "normal," predictable, or sex-linked caused from a sickness, accident or otherwise, that lasts 8 or more days. The only exclusion from coverage is disability associated with normal pregnancy and childbirth. Pregnancy-related disabilities result in the same job-related disadvantages as other disabilities, including inability to work for medically certifiable reasons, loss of income, hospitalization, medical expenses and even the risk of death. This disability is sex-linked--the result of a physical structure and biological potential which, more than any other characteristic, defines a person as a member of the female sex. It is ironic that the carrying out of this biological function, originated by both a man and a woman, and recognized under our Constitution as a fundamental right

because it makes possible the future of humanity, should be penalized in the job market when it causes infirmities which, if they originated from any other source, would be compensated.

AT&T's Plan takes every man as it finds him, compensating every disability to which a male employee is prone, including disabilities peculiarly male. The women employees of AT&T do not receive a similar measure of security in their service to the company, since a major category of disabilities to which they are prone--pregnancy-related disabilities-- are not covered by the program. That a period of disability occurs during pregnancy and childbirth when the woman is unable to perform the required tasks of the job, is implicit in the Supreme Court's decision in Geduldig v. Aiello, supra, and explicit in the finding of the District Court in Gilbert v. General Electric Co., 7 F.E.P. Cases 796, 803 (E.D. Va. 1974) that pregnancy without complications is normally disabling for a period of six to eight weeks. Such differential treatment of men and women, which places women workers at a decided comparative disadvantage, is sex discrimination. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

B. The Effect Of Pregnancy Discrimination In the Labor Market Affects The Status Of All Women Workers By Discouraging Labor Market Participation Of Women Of Childbearing Age, Limiting Employment Opportunities For Women, And Depressing Women's Wages.

The conclusion that employer maternity rules must be included within the congressional mandate to achieve sex equality in the labor market is richly supported by labor market realities for women. Perhaps no employer practices are more grounded on stereotypes concerning women's physical limitations and "proper place" in society, or more adversely affect their occupational development and wage levels, than those which separate them out for special and disadvantageous treatment because of pregnancy.

The wage level of women, compared to men, is a problem of major proportion and in fact a national disgrace. Women in this country average yearly wages equal to sixty percent of men's average wages, U.S. Dept. of Labor, Women's Bureau,

"Economic Report of the President" (1973), a fact rendered more devastating by the additional fact that two-thirds of the 33 million women in the labor force work because of pressing economic need. U.S. Dept. of Labor, Women's Bureau, "Why Women Work" (rev. ed. 1972). According to the Census Bureau, women appear to constitute the largest identifiable group of poor people in the nation. United States Bureau of the Census, "Female Family Heads," Series P-23, Report #50 (1974).

Employer pregnancy rules all too obviously contribute to the wage depression of women. First, without the protection umbrella of Title VII, employers can, as they have done historically, refuse to hire young women for positions of responsibility or to promote them to better positions because of the possibility of pregnancy. Employers can, as they have done historically, terminate women, or place them on forced leave as soon as they are known to be pregnant, or at any point thereafter, without regard to medical necessity, job requirements or the economic wellbeing of the pregnant employee. Also, the months of a woman's mandatory pregnancy

leave are most likely to occur during a period in the careers of working people when they are establishing themselves in the labor market, developing skills, and laying the foundation for advancement of their careers.

Second, if a woman goes on nonpaid maternity leave and becomes disabled for reasons having nothing to do with her pregnancy, she may find, as AT&T employees do, that the sickness and accident benefits for which employees are eligible during personal leaves are not available to her. Moreover, more than two-thirds of private employers, like AT&T provide no wage replacement during the time the pregnant woman is physically disabled from working by pregnancy-related causes, while employees absent for eight or more days for any other disability receive benefits under the Plan. Thus, most women workers face the cost of hospitalization and a new dependent without the resources available to other disabled employees.

The women workers who seek to return to their jobs after giving birth often find their jobs gone or they may be accepted back into the company in a lesser position. Pension and seniority rights may have been lost. Unlike other employees on disability absence who receive service and pension credits for the entire period, female employees receive the credits, which govern seniority for permanent promotion for only the first month of maternity leave.

Further, during maternity leave, employees must pay the cost of remaining within AT&T's Basic Medical Expense Plan. While AT&T continues to pay for coverage of other employees on sick leave; pregnant employees must give 60 days advance notice of the date of the start of their maternity leave, while other employees must give notification only at the time of absence; and employees on maternity leave are not assured of re-employment.

The short and long range effects of such employer practices upon working women, as individuals and as a class,

are incalculable, but it is clear that these practices deny women compensation available to their male co-workers, have an overall depressant effect on women's wages, maintain women as a cheap source of labor, and so greatly affect women's opportunities for advancement in professional development that the effects may in many instances span a woman's working life. These effects in turn increase the number of women who are only marginally attached to the labor force. See generally Testimony of Catherine East, Executive Secretary, Citizens' Advisory Council on the Status of Women, Joint Appendix, Vol. II, pp. 426-428; E. Koontz, "Childbirth and Child Rearing Leave: Job-Related Benefits," 17 N.Y. L. Forum 480 (1971); Comment, "Love's Labors Lost: New Conceptions of Maternity Leaves," 7 Harv. Civ. Rights-Civ.Lib.Rev. 260 (1972); Cary, "Pregnancy Without Penalty" 1 Civ. Lib. Rev. 31 (1974); Hayden, Punishing Pregnancy (ACLU Report 1973).

These employer policies are based not on the "nature" of women or the realities of pregnancy, delivery, and puerperium, but on self-fulfilling prophecies. Employers assume

that women are not interested in careers, especially if they become pregnant, and work only for "pin money." They therefore have no interest in giving women employees an equal share of wages or other fringe benefits. It is also assumed that women become squeamish about work during pregnancy, either justifiably--and should be protected from themselves--or unjustifiably, so that the common fund should be protected against their hypochondria. [To the contrary, some mandatory maternity leave rules originated because of male embarrassment in the presence of an obviously pregnant woman. Cleveland Board of Education v. LaFleur, 414 U.S. 632, 641 n.9 (1974).] As a result of the invidious treatment by their employers, women sometimes fulfill the employer prophecy: they do lose their interest in pursuing their career because of its depressed wages and lack of opportunity for promotion. The loss to our national commerce and economic wellbeing from such lost human resources is an evil which Congress sought to eradicate in passing Title VII.

C. Title VII Is A Comprehensive Statutory Scheme Intended To Proscribe Practices Which Are Fair In Form But Discriminatory In Operation

The promise of Title VII is that it will eliminate all unjustified and unnecessary obstacles which effect classes of persons protected by the Act. As the Supreme Court stated in Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971):

What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Defendant argues that it has not discriminated against women by use of its exclusionary disability benefits policy, and that its failure to include certain absences which are related to pregnancy or childbirth is based upon a rational and neutral business justification under Title VII. Defendant has misread Title VII.

Title VII, like many other congressional enactments, goes beyond the Constitution's proscription of overt discrimination to attack the disparate impact of traditional practices on certain groups, however benign the intent of those practices may be. As the Supreme Court found the first time it had occasion to construe the scope of Title VII:

The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation...

Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.

Griggs v. Duke Power Co.,  
401 U.S. 424, 431-432 (1971).

In Griggs, it was alleged that the company discriminated against blacks by utilizing certain tests. The company vigorously contended that the evidence showed its lack of discriminatory intent. Based on Congress' desire to proscribe practices with a discriminatory effect, regardless of intent, the Court treated the company's benign intent as irrelevant. See H.R. Rep. No. 92-233, 92d Cong., 2d. Sess. 21-22 (1972), which

explicitly approves the Griggs interpretation of Title VII. Similarly, in Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94 S. Ct. 334, 338 (1973), the Court reiterated:

Certainly Title VII prohibits discrimination...whenever it has the purpose or effect discriminating on the basis of national origin.

(Emphasis added.)

Courts deciding sex discrimination cases under Title VII have drawn more specific conclusions regarding the intent of the statute. Thus, in Diaz v. Pan American World Airways, Inc., 442 F. 2d 385, 386 (5th Cir.), cert. denied, 404 U.S. 950 (1971), the Court, after noting the paucity of the legislative history, took into account the Act's commerce clause and moral origins, stating:

In attempting to read Congress' intent in these circumstances... it is reasonable to assume, from a reading of the statute itself, that one of Congress' main goals was to provide equal access to the job market for men and women. Indeed, as this court in Weeks v. Southern Bell Telephone and Telegraph Co., 5 Cir., 408 F. 2d 228 at 325 clearly stated, the purpose of the Act was to provide a foundation in law for the principle of non-

discrimination. Construing the statute as embodying such a principle is based on the assumption that Congress sought a formula that would not only achieve optimum use of our labor resources but, and more importantly, would enable individuals to develop as individuals.

Id. at 386-387.

Consistent with the liberal purposes of Title VII, the Seventh Circuit, in Sprogis v. United Airlines, Inc., 444 F. 2d 1194, 1198 (1971), described the congressional intent as follows:

The scope of Section 703 (a) (1) is not to be confined to explicit discriminations based "solely" on sex. In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. Section 703 (a) (1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past. The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class. Discrimination is not to be tolerated under the guise of physical properties possessed by one sex (cf. Cheatwood v. South Central Bell Telephone and Telegraph Co., 303 F. Supp. 754, 759-760 (M.D. Ala. 1969)), or

through the unequal application of a seemingly neutral company policy. Cf. Phillips v. Martin Marietta Corp., 400 U.S. 542, 91 S. Ct. 496, 27 L. Ed. 2d 613.

See also Rosen v. Public Service Electric and Gas Co., 477 F. 2d 90, 95 (3d Cir. 1973).

The exclusion of sex-correlated disabilities from benefits violates Title VII both by intention and by result. Title VII was intended and has been applied to reach as far and as deep as do racial, ethnic, religious and sex-based job discrimination themselves. Preoccupation with conscious or malevolent discrimination is not permitted under the standards of Title VII. See Griggs v. Duke Power Co., 401 U.S. 424 (1971). See also Brown v. Gaston County Dyeing Machinery Co., 457 F. 2d 1377 (4th Cir.), cert. denied, 409 U.S. 982 (1972); Robinson v. Lorillard Corp., 444 F. 2d 791 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971); King v. Laborers Int'l. Union, 443 F. 2d 273, 278 (6th Cir. 1971); Marquez v. Omaha District Sales Office, 440 F. 2d 1157, 1160 and 1162 (8th Cir. 1971). See generally Cooper, "Equal Employment Law Today," 5 Colum. Human Rts. L. Rev. 263 (1973).

That the scope of Title VII--and hence its enforcing

interpretations--should sweep so broadly is neither surprising nor unusual. The basis for congressional authority to enact Title VII was the commerce clause, the source of other sweeping legislation designed to regulate employment relationships and eradicate congressionally perceived discrimination. See 110 Cong. Rec. 1528, 7202-7212, 8452-8456.

In N.L.R.B. v. Jones & Laughlin S. Corp., 301 U.S. 1 (1937), for example, the Court upheld Congress' power to regulate employer-employee relations affecting commerce under the National Labor Relation Act. The Court declared:

The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for its "protection or advancement" [citation omitted]; "to adopt measures to promote its growth and insure its safety" [citation omitted]; "to foster, protect, control, and restrain." [citation omitted] That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it."

Id. at 36-37.

See also N.L.R.B. v. Fainblatt, 306 U.S. 601, 604 (1939);  
United States v. Darby, 312 U.S. 100, 115 (1941).

Similarly, in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), congressional power under the commerce clause to outlaw race discrimination in public accommodations through Title II of the 1964 Civil Rights Act was upheld. See also Katzenbach v. McClung, 379 U.S. 294, 303-304 (1964).

Further confirmation that Congress exercises its power to statutorily proscribe rules and practices which might otherwise bear up under constitutional scrutiny in court may be found in statutes enacted under Section 5 of the fourteenth amendment. While Congress may not diminish the scope of equal protection as guaranteed by the fourteenth amendment and interpreted by the courts, Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966), it is empowered, in the words of Section 5 of the fourteenth amendment, "to enforce, by appropriate legislation, the provisions of [the fourteenth amendment]." Congress is not limited in its Section 5 powers to passing legislation prohibiting practices courts have held, or would hold, to violate the equal protection clause. Rather, the standard is that estab-

lished in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), under the Necessary and Proper Clause of the Constitution. As applied in the Section 5 context, that standard is: (a) whether the legislation may be regarded as an enactment to enforce the equal protection clause; (b) whether it is "plainly adapted to that end" and whether it is not prohibited by but is consistent with "the letter and spirit of the Constitution." Katzenbach v. Morgan, *supra*, 384 U.S. 641, 648-651. See also Oregon v. Mitchell, 400 U.S. 112, 141, 248-249, 286-287 (1970). Cf. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437-440 (1968) (Congress, under the enabling clause of the thirteenth amendment, has the power rationally to determine what are "badges and incidents of slavery" without regard to judicial interpretation of the amendment's prohibition).

In Morgan, the issue was whether Congress had exceeded its powers under Section 5 when it passed Section 4(e) of the Voting Rights Act of 1965. Section 4(e) provided that no person who had successfully completed the sixth grade in a Puerto Rican public school or accredited private school

in which the instruction was in a language other than English could be denied the right to vote because of inability to read or write English. New York urged that Section 4(e) could not be sustained unless the judiciary decided that the application of English literacy tests violated the equal protection clause. The Court rejected this contention, stating that its task was not to determine whether the English literacy test violates the equal protection clause. It further stated that its decision in Lassiter v. Northampton County Bd. of Election, 360 U.S. 45 (1959), sustaining a North Carolina English literacy test, was therefore inapposite. Id. at 649.

Significantly, in Lassiter, the Court noted that a literacy test fair on its face might be used to perpetuate discrimination, but found no violation because such discriminatory use was not alleged or found in that case. Lassiter at 53.

Section 5 of the Voting Rights Act of 1965 is also analogous to Title VII. Section 5 provides that no state or political subdivision thereof in specified jurisdictions may change voting qualifications or practices unless the "change does

not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color..." 42 U.S.C. § 1973c (emphasis added). Permission to make any voting change must be obtained from the U.S. Attorney-General or District of Columbia district court. That Section 5 goes far beyond the fourteenth amendment's requirements was recently given striking confirmation when this court found insufficient proof of unconstitutionality and upheld, against a fourteenth amendment challenge, the city of Richmond's annexation of surrounding territory. Holt v. City of Richmond, 459 F. 2d 1093 (4th Cir. 1972). Because the Attorney-General had objected to the annexation, however, it was enjoined, 406 U.S. 903 (1972), and the City has had to seek separate approval under Section 5. See City of Richmond v. United States, C.A. No. 1718-72 (D.D.C. 1972). See also City of Petersburg v. United States, 354 F. Supp. 1021 (D.D.C. 1972), aff'd, 412 U.S. 901 (1973) (sub nom. Diamond v. United States), where annexation was enjoined under Section 5 upon a showing of adverse effect alone, all parties conceding the lack of discriminatory intent.

Title VII, like Section 4(e) and 5 of the Voting Rights Act of 1965, is directed at the consequences of employment practices, not the moral guilt of the employer. Its target is the recovery and development for the nation of otherwise lost human resources and the assurance of equality of opportunity in the job market. It is for this reason that Appellant's exclusion of pregnancy-related disabilities from coverage under its sickness and accident policy contravenes Title VII, and why the EEOC's interpretation of Title VII in its Sex Discrimination Guidelines is not only consistent with but also impelled by a fair reading of the Act.

D. Geduldig v. Aiello Has No Bearing On The Case At Bar

In Geduldig v. Aiello, \_\_\_\_ U.S. \_\_\_\_, 94 S. Ct. 2485 (1974), the Supreme Court held that the Fourteenth Amendment, standing alone, does not require the inclusion of pregnancy-related disabilities in a state disability program. Title VII should mandate a different result with regard to AT&T's exclusion of pregnancy-related disabilities from its fringe benefit program for employees. The reason should be apparent: the

requirements of Title VII and of the equal protection clause are decidedly different. The statute is a positive command by Congress to halt employment practices discriminatory in impact. The constitutional restraint has functioned, at most, as a mild restriction on official action establishing sex-related differentials.

To prove a prima facie case of invidious discrimination under the fourteenth amendment, one must establish not only that he or she has been adversely affected, but also that the state has acted intentionally in discriminating against him or her. This is the case even with respect to race discrimination, the issue with which the fourteenth amendment is centrally concerned. Although lower courts and commentators wrestled for a time with the legality of "de facto" discrimination under the equal protection clause (see, e.g., Chance v. Board of Examiners, 458 F. 2d 1167, 1177-78 (2d Cir. 1972)), the Supreme Court has held only recently that a showing of intent is necessary to establish a denial of equal protection, subject to strict judicial scrutiny. Keyes v. School District No. 1, 413 U.S. 189 (1973).

Cf. Palmer v. Thompson, 403 U.S. 217 (1971) (intent not synonymous with legislators' motives).

In Keyes the Court for the first time dealt with a segregated school system which had never been subject to de jure segregation pursuant to state statute or ordinance. Searching the record, the Court found that Denver had indeed taken official action intended to segregate its schools by race. Discussing the sufficiency of the evidence, the Court stressed the constitutional requisites:

We emphasize that the differentiating factor between de jure segregation and so-called de facto segregation... is purpose or intent to segregate. 413 U.S. 189, 208. (Emphasis in original).

It is true, the Court emphasized, that intent to discriminate may be inferred from past discriminatory practices. Id. at 208. And the existence of past discrimination may invoke the remedial powers of the court to enjoin otherwise constitutional acts which would have the effect of perpetuating that discrimination. Id. at 2699. See, e.g., Wright v. Emporia, 407 U.S. 451, 459 (1972); United States v. Montgomery Board of Education, 395 U.S. 225 (1969); United States v. Chesterfield County School Board, 484 F. 2d 70 (4th Cir. 1973);

compare White v. Regester, 412 U.S. 755 (1973), with Whitcomb v. Chavis, 403 U.S. 124 (1971). But some past or present intentionally discriminatory act, however, demonstrated (see, e.g., Gomillion v. Lightfoot, 364 U.S. 339 (1960) (circumstantial evidence); Reed v. Reed, 404 U.S. 71 (1971) (face of statute)) must be shown to justify relief under the fourteenth amendment.

Title VII, in contrast, is a grand congressional plan, routed in the plenary commerce clause, and the broad-gauged, implementation clause of the fourteenth amendment. See Section II-C above. Affirmative legislation deliberately adopted under the national legislature's most encompassing authority may regulate private and public conduct far more extensively than a negative restraint imposed on government by the Constitution alone. Since Title VII bars practices which have the effect of disadvantaging workers on account of their race, sex, national origin, or religion, however innocent the intent, the holding in Aiello does not touch the matter at issue here. Concededly, in both cases, the rules in question have a disparate impact on women. But disparate impact on, even devastating results for, the class

affected do not suffice to establish invidious discrimination under the fourteenth amendment. Discriminatory results for a protected group do suffice to render an employment pattern or practice vulnerable under Title VII. Where impact is demonstrated, as it is here, a heavy burden is cast on the employer to show "business necessity" for the practice. See Griggs v. Duke Power Co., *supra*; Robinson v. Lorillard Corp., 444 F. 2d 791 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971).

If the Court had found the statute to be a pretext for discriminating against women, the demonstrated intent would justify relief. 94 S. Ct. 2485, 2492 n. 20. Cf. Gaston County v. United States, 395 U.S. 285 (1969); Guinn v. United States, 238 U.S. 347 (1915); Lane v. Wilson, 307 U.S. 268 (1939). In the absence of a showing that the rule was intended to discriminate (or was a "pretext" for discriminating) against women as a class, the Court judged the constitutional challenge by the more lenient "rational basis" test and upheld it. The same test would be used to judge any challenge to de facto discrimination. See, e.g., Chance v. Board of Examiners, 458 F. 2d 1167 (2d Cir. 1972).

7  
The question of intent is not material here, however for it is clear that AT&T's disability benefit policies have the effect of discriminating against women on account of their sex, and such an effect, standing alone, is enough to predicate a finding that Title VII has been violated. Aiello therefore has no bearing on the question presented in this case.

There is a further vital distinction between the constitutional principles underlying Aiello and the principles governing this Title VII case. Despite recent and significant extensions of equal protection principles to certain sex-based inequalities in law, it is clear that gender discrimination is not yet subject to the same constitutional strictures as is race discrimination. In Frontiero v. Richardson, 411 U.S. 677 (1973), only four members of the Court endorsed an equal protection/strict scrutiny test for sex discrimination cases. The statutory test of Title VII is qualitatively different: race and sex-based discrimination in employment are equally unlawful. Title VII, unlike the Fourteenth Amendment, does not carry a weaker test for sex-based than for racial discrimi-

mination. See, e.g., Wetzel v. Liberty Mutual Ins. Co., 372 F. Supp. 1146, 1159 (W.D. Pa. 1974). A simple example highlights this point. Had Aiello involved exclusion of a race-linked disabling condition, such as sickle-cell anemia, a conclusion of invidiousness for fourteenth amendment equal protection purposes should have been irresistible. The classification itself would reflect intent and reasoning that the exclusion affected only some blacks would have been unthinkable. See Geduldig v. Aiello, 94 S. Ct. 2485, 2492 n.20. With respect to gender classifications tested under equal protection, however, the Court has so far called a halt to legislative line-drawing only in the most blatant situations. Both Reed and Frontiero involved statuses that disfavored one sex for no reason other than the most crude generalizations concerning "typical" behavior of men and women. Thus classifications concerning pregnancy, though of course "sex-based," are indeed distinguishable from the utterly irrational lines struck down in Reed and Frontiero.

In sum, the fourteenth amendment neither fixes the scope of Title VII's prohibition of sex discrimination nor informs its interpretation.

E. The EEOC's Interpretation of Title VII, Embodied  
In Its Pregnancy and Childbirth Guidelines, Is  
Entitled to Great Deference

A major issue in this case is the validity of the EEOC's construction of Title VII with respect to pregnancy-related disabilities as that interpretation is embodied in Title VII Sex Discrimination Guidelines, 29 C.F.R. § 1604.10. The standards for making that determination are well established.

Two Supreme Court cases have addressed the validity of of EEOC guidelines. In Griggs v. Duke Power Co., *supra*, 401 U.S. 424 (1971), the Court applied to the Title VII guidelines the standard applied generally to administrative interpretations; the EEOC's interpretation of Title VII is entitled to "great deference." In Espinoza v. Farah Mfg. Co., *supra*, 414 U.S. 86, the Court elaborated upon this standard. Rejecting the EEOC's interpretation of national origin discrimination as including discrimination against non-citizens, the Court stated that deference to agency interpretations must have limits where application of the guideline "would be inconsistent with obvious congressional intent not to reach the employment practice in question." In further

clarification of this criteria for deference, the Court added that "Courts need not defer to an administrative construction of a statute where there are 'compelling indications that it is wrong'." (Id. at 94-95, emphasis added.) See also Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367, 381 (1969).

The logical concomitants of the Espinoza criteria are spelled out in other high court decisions. In giving deference to a guideline, a court need not find that the agency's construction is the only reasonable one nor even that it is the one a court would make in the first instance in a judicial proceeding. See, e.g., Udall v. Tallman, 380 U.S. 1, 16 (1965); Unemployment Comm. v. Aragon, 329 U.S. 143, 153 (1946). When legislative intent is unclear, lack of an intent to reach a contrary result is sufficient to uphold the agency's interpretation, so long as that interpretation enhances the purposes and policies underlying the legislation. See, e.g., Unemployment Comm. v. Aragon, supra, 329 U.S. 143, 151; Bartmess v. Drewrys U.S.A., Inc., supra, 444 F. 2d 1186, 1190. The constitutionality of the policies or practices than an agency interpretation deems violative of a congressional enactment is irrelevant to a court's determination of the

deference due to that agency interpretation. Espinoza v. Farah Mfg. Co., supra, 414 U.S. 86, 91.

Applying these principles to the pregnancy disability guideline, it is apparent that the guideline is entitled to the full deference given to the EEOC Guideline at issue in Griggs. In Gilbert v. General Electric Co., supra, 375 F. Supp. 367, 381, the court stated, "The law is well-settled that the decisions or interpretation of agencies entrusted with the enforcement of a federal statute, while not binding on a federal court, are nevertheless entitled to a great deference...except under limited circumstances, e.g. where legislative history indicates a contrary result..."

1. There is no specific legislative intent contravening the EEOC Guidelines.

Evidence of a specific congressional intent with respect to the coverage and treatment of pregnancy issues (and, indeed, almost any sex discrimination issue) does not exist. Because the Act was amended to include sex one day before its passage by the House, no hearings were held on the sex discri-

mination provisions and congressional debate was unusually general and brief. (See 110 Cong. Rec. H2577-2584 (1964). See also Diaz v. Pan-Am World Airways, Inc., *supra*, 442 F. 2d 385, 386). Manifestly, the guideline does not contravene a specific congressional intent since none was expressed. Rather, the sex discrimination amendment was added to the bill over the protest of advocates of equality for women who urged that, in the language of a letter from the President's Commission on the Status of Women, read into the record, the issue of sex discrimination be treated separately and "special attention be given to difficulties that are wholly or largely products of this kind of discrimination." (See 110 Cong. Rec. H2577 (1964). See also 110 Cong. Rec. H2584 (1964) (Statement of Congresswoman Green).) Thus attempts to promote explicit exploration by Congress of situations such as the instant one failed, and, at least as to a specific congressional intent to exclude pregnancy from the coverage of Title VII, the "compelling indications" that the pregnancy guideline is wrong are entirely lacking.

Instead, Congress put the legal priority of ending sex discrimination in employment on a par with the eradication of racial, ethnic, and religious discrimination in employment. 42 U.S.C. §2000e-2 provides the mandate to eliminate the full range of sex-based, racial, ethnic, or religious discrimination; those general outlines are not limited by special exclusions or restrictions applicable only to sex discrimination.

The clear direction of Congress, from the statute and its history alike, was to reach every employer policy or practice which was designed or which resulted in unlawful discrimination. Amici submit that the guideline at issue herein fully follows that clear congressional direction: it cannot reasonably be asserted that the guideline in any way contravenes the policy of the Act.

2. The EEOC's guideline enhances the general purposes and policies of Title VII.

Because of the lack of clear direction from the Congress, the EEOC pregnancy guideline was necessarily fashioned by the agency with an eye toward the more general purposes, scope, and intent of Title VII. We submit that not only does

the guideline fail to contravene an "obvious congressional intent," it quite plainly enhances the general purposes and policies underlying Title VII.

The legislative history of Title VII indicates that the term "discrimination" was meant to be broadly defined. In response to a protest that the meaning of "discrimination" was unclear, Senators Clark and Case, floor managers of the bill in the Senate, broadly defined the term in an interpretive memorandum as "to make a distinction, to make a difference in treatment or favor..." 110 Cong. Rec. H7213 (1964). Amendments in the House and Senate intended to narrow that scope of Title VII's prohibitions by restricting the Act to discrimination "solely" on the basis of race, sex, national origin or religion were defeated. Compare Reed v. Reed, 404 U.S. 71, 75 (1971), which states that discrimination "solely" on the basis of sex is prohibited by the fourteenth amendment.

The EEOC's pregnancy guideline is wholly consonant with these expressions concerning the scope of Title VII. As discussed more fully in Section II-B, supra, employer rules dealing with the woman employee's childbearing role

are perhaps the most persistent and economically oppressive factors in the historical and severe wage depression suffered by women workers. It is therefore not surprising that a majority of courts considering the issue of pregnancy rules have reached the same conclusion as the EEOC: employer rules that treat pregnancy specially, rather than by the standards applied to medical disabilities, are a violation of Title VII's prohibition of sex discrimination. See, e.g., Wetzel v. Liberty Mutual Ins. Co., 372 F. Supp. 1146 (W.P. Pa. 1974); Berg v. Richmond Unified School District, App. No. 74-1457 (9th Circuit 1974) (appeal pending); Lillo v. Plymouth Local Bd. of Education, \_\_\_\_ F. Supp. \_\_\_\_, 8 E.D.P. ¶ 9510 (N.D. Ohio 1974); Dessenberg v. American Metal Forming Co., 6 E.D.P. ¶ 8813 (N.D. Ohio 1974); Hutchison v. Lake Oswego School District No. 7, 374 F. Supp. 1056 (D. Ore. 1974). Even Newmon v. Delta Air Lines, Inc., 374 F. Supp. 238 (N.D. Ga. 1973), holding workers disabled by pregnancy are not entitled to disability benefits, recognized that discrimination against pregnant women is sex discrimination. Newmon held that the airline's mandatory maternity leave provision violated Title VII, thus

necessarily determining that pregnancy discrimination is sex discrimination under the Act. On the issue of disability benefits, however, the court rejected the guidelines because there was no factual showing that pregnancy per se is a disability or sickness. In the instant case, ample evidence supported the finding below that pregnancy does give rise to medical disabilities.

3. The fact that the guideline was not issued contemporaneously with the Act is irrelevant to its validity.

There is no basis for arguing that the EEOC's pregnancy guidelines are not entitled to deference primarily on the fact that the guideline was not formulated contemporaneously with the passage of the Act. The agency's interpretation of Title VII, whenever officially announced, is a statement of principles which from the outset inhere in the Act itself. The timing of the agency's interpretation is therefore of little relevance in determining the validity of that interpretation. Bartmess v. Drewrys, supra, 444 F. 2d 1186.

Without the voluminous legislative history that was available for race discrimination, both the EEOC and the courts were faced with a peculiarly difficult task of inter-

pretation. Sex discrimination as a phenomenon had received little national attention at the time the Act was passed. The first major national legislation dealing with the problem--the Equal Pay Act--went into effect the year Title VII was passed, and dealt only with a narrow aspect of the general problem of sex discrimination. A major change in direction on the issue did not come from the Supreme Court until 1971. State fair employment practices laws had existed for many years but most did not include sex discrimination. Executive order 11246, prohibiting employment discrimination by federal contractors, did not cover sex discrimination until its amendment by Executive Order 11375 in 1967. 32 Fed. Reg. 14303 (1967), 3 C.F.R. 173.

It is not surprising, therefore, that the EEOC's understanding of problems of sex discrimination was an evolving one. That agency, of necessity, "proceeded with caution" to forge the parameters of the concept through its own experience, guided only by the Act's overall intent to place women on an equal footing in the market place. (See introduction to the first Guidelines on Sex Discrimination, 30 Fed. Reg. 14926-14927 (1965).) In areas other than pregnancy, guidelines

not issued contemporaneously with the effective date of the Act reflected that evolving understanding and have been given full recognition by the courts. For example, the guideline declaring that different retirement ages for men and women violate Title VII was issued in February of 1968, 33 Fed. Reg. 3344, 29 C.F.R. § 1604.9(b), and given great deference by the Seventh Circuit in Bartmess v. Drewrys, U.S.A., Inc., supra, 444 F. 2d 1186, cert. denied, 404 U.S. 939 (1971). An even more important guideline, expressing the EEOC's view that state protective legislation for women conflicts with Title VII's policy of nondiscrimination, was issued, "albeit after considerable hesitation," in August of 1969. 34 Fed. Reg. 13367, 29 C.F.R. § 1604.2(b) (1)-(5). That guideline has also been accorded great deference by the courts, see, e.g., Rosenfeld v. Southern Pacific Co., supra, 444 F. 2d 1219, 1226, despite a prior contrary interpretive guideline, 30 Fed. Reg. 14927 (1965), and despite the fact that such protective legislation had been upheld under the fourteenth amendment by the United States Supreme Court. Muller v. Oregon, 208 U.S. 412 (1908).

Indeed, there is recognition from Congress itself that

the process of interpretation of Title VII is necessarily an evolutionary one. The Report of the Senate Committee on Labor and Public Welfare recommending passage of certain amendments to strengthen Title VII enforcement summed up this perception as follows:

In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization...Experience has shown this view to be false.

Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of systems and effects rather than simply intentional wrongs...

In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that the problem exists in the first instance, and that the system complained of is unlawful. (S. Rep. No. 92-415, 92d Cong., 1st Sess. 5.)

See also H.R. Rep. No. 92-238, 92d Cong. 2d Sess. 8 (1972).

The Report's observation is particularly relevant to the evolution that occurred concerning employer pregnancy rules, "one of the problems that...baffled the Commission

most."

Within four years of the effective date of the Act, EEOC decisions began to reflect the agency's evolving realization that maternity issues were necessarily within the coverage of Title VII. See, e.g., CCH EEOC Decisions (1973) ¶ 6125 (June 16, 1969) (termination of an employee on the basis of pregnancy and subsequent refusal to rehire her is unlawful sex discrimination); CCH EEOC Decisions (1973) ¶ 6084 (Dec. 16, 1969) (employer must offer maternity leave to female employees); CCH EEOC Decisions (1973) ¶ 6170 (Sept. 17, 1970) (in absence of evidence that policy of denying leaves for maternity was necessary to operation of his business, employer's discharge of employee in the sixth month of pregnancy was sex discrimination because it adversely affects females without an equivalent effect on males); CCH EEOC Decisions (1973) ¶ 6184 (Dec. 4, 1970) (in absence of legitimate business considerations for a rule that conditioned eligibility for maternity leave on two years of employment, the adverse effect on this rule on female employees constituted unlawful sex discrimination);

PAGE

CCH EEOC Decisions (1973) § 6221 (March 19, 1971) (denial of weekly disability benefits to female employees disabled by pregnancy is sex discrimination); CCH EEOC Decisions (1973) § 6412 (Aug. 24, 1971) (in determining time for employee's maternity leave, the principle of nondiscrimination requires that leave be based on individual capacities rather than characteristics attributed to the group). Development of the guideline itself took place over a three and a half year period. See Comment, Love's Labor Lost: New Conception of Maternity Leaves, *supra*, 7 Harv. Civ. Rights - Civ. Lib. Review 260, 269 n. 54.

This period of evolution was marked by increasing consciousness of the problem of pregnancy-related sex discrimination throughout the federal government. On October 29, 1970, the Citizens' Advisory Commission on the Status of Women adopted a statement of principles substantially the same as the pregnancy guideline finally issued by the EEOC on March 30, 1972. (See E. Koontz, Childbirth and Child Rearing Leave: Job Related Benefits, *supra*, 17 N.Y.L. Forum 480, 481, 482 n. 11 (1971).) The Office of Federal Contract Compliance,

the agency responsible for enforcement of Executive Order 11246, as amended by Executive Order 11375, early considered maternity issues within the coverage of the Executive Order's prohibition of sex discrimination (see 41 C.F.R. § 60-20.3 (g) (1)-(2) (1971)) but, like the EEOC, developed and refined its understanding of the phenomenon over time. (See proposed Sex Discrimination Guidelines § 60-20(h) (2), 38 Fed. Reg. 35336, 35338 (Dec. 27, 1973), a provision virtually identical to the EEOC's pregnancy guideline. See also Proposed Regulations to Title IX of the Higher Education Act of 1972, 20 U.S.C. § 1681 et seq. Title IX prohibits sex discrimination by educational institutions; the guideline contains a pregnancy provision virtually identical to the EEOC guideline. Proposed § 86.47(c), 39 Fed. Reg. 22228, 22237 (June 20, 1974).

Thus the EEOC, faced with unusually difficult problems of statutory construction, "carefully scrutinized both employer practices and their crucial impact on women for a substantial period of time and then issued their guidelines after it had become increasingly apparent that systematic

and pervasive discrimination against women was frequently found in employers denial of employment opportunity and benefits to women on the basis of a childbearing role, performed solely by women." Geduldig v. Aiello, supra, \_\_\_\_ U.S. \_\_\_\_, 94 S. Ct. 2485, 2494 n.6 (1974) (dissenting opinion of Brennan, J.). Amici curiae submit that because of the special circumstances surrounding the addition of sex discrimination to Title VII described above, the EEOC properly withheld a formal interpretation until it was able fully to consider the issue in light of its experience under the Act. Its final resolution of the issue, as embodied in the pregnancy guideline, clearly enhances the purposes and policies underlying the legislation and indeed is essential if women are to gain equality in the labor market. The guideline is entitled to great deference.

F. The Congressional History Of The Equal Rights Amendment Has No Bearing On The Intent Of Title VII, But If It Did It Would Support The Coverage Of Employer Pregnancy Rules

As with any congressional history, members of Congress advocated many different positions on a variety of issues raised by the equal rights amendment. In the midst of con-

sideration of the amendment, however, there appeared in the Yale Law Journal a comprehensive and detailed theory of the amendment's thrust. That theory, proposed by three law students and Professor Thomas Emerson, who testified before committees of the House and Senate, became a focal point for subsequent debate and clarified the view of the major proponents of the amendment. Brown, Emerson, Falk & Freedman, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," 80 Yale L.J. 871 (1971) (hereinafter "Emerson article"). The Emerson article was praised by principal proponents of the amendment (118 Cong. Rec. S9083 (1972)), cited with approval in congressional reports (S. Rep. No. 92-689, 92d Cong., 2d Sess. 11 (1972); H.R. Rep. No. 92-359, 92d Cong. 1st Sess. 6 (1971)), and referred to by its most vocal opponent, Senator Ervin, as the "primary legislative history" of the amendment. (118 Cong. Rec. S9097 (1972)).

The basic principle of the equal rights amendment, as explained by the Emerson article and understood by the amendment's proponents, is that gender is simply not a permissible factor for determining the legal rights of people. (Emerson

article, supra, 80 Yale L.J. 871, 889.) Sex-based classifications are prohibited; they are invalid per se. (Compare McLaughlin v. Florida, 379 U.S. 184, 189 (1964) (concurring opinion by Stewart, J.).) However, this standard, applied to classifications based on physical characteristics unique to one sex, could lead to illogical and absurd results: laws relating to the nursing of children or donations to sperm banks would be rendered invalid even though non-invidious, narrowly drawn, and serving a legitimate purpose.

Nonetheless, as the Emerson article points out, individuals affected by laws classifying on the basis of sex-unique characteristics do obtain a benefit or are subject to a restriction because they are members of one or the other sex. (Emerson article, supra, 80 Yale L.J. 871, 893.) Emerson therefore described a "subsidiary principle" of the equal rights amendment. Under this subsidiary principle, laws concerning physical characteristics unique to one sex would not be per se invalid. Rather, they would be subject to strict judicial scrutiny to insure the full equality of the sexes:

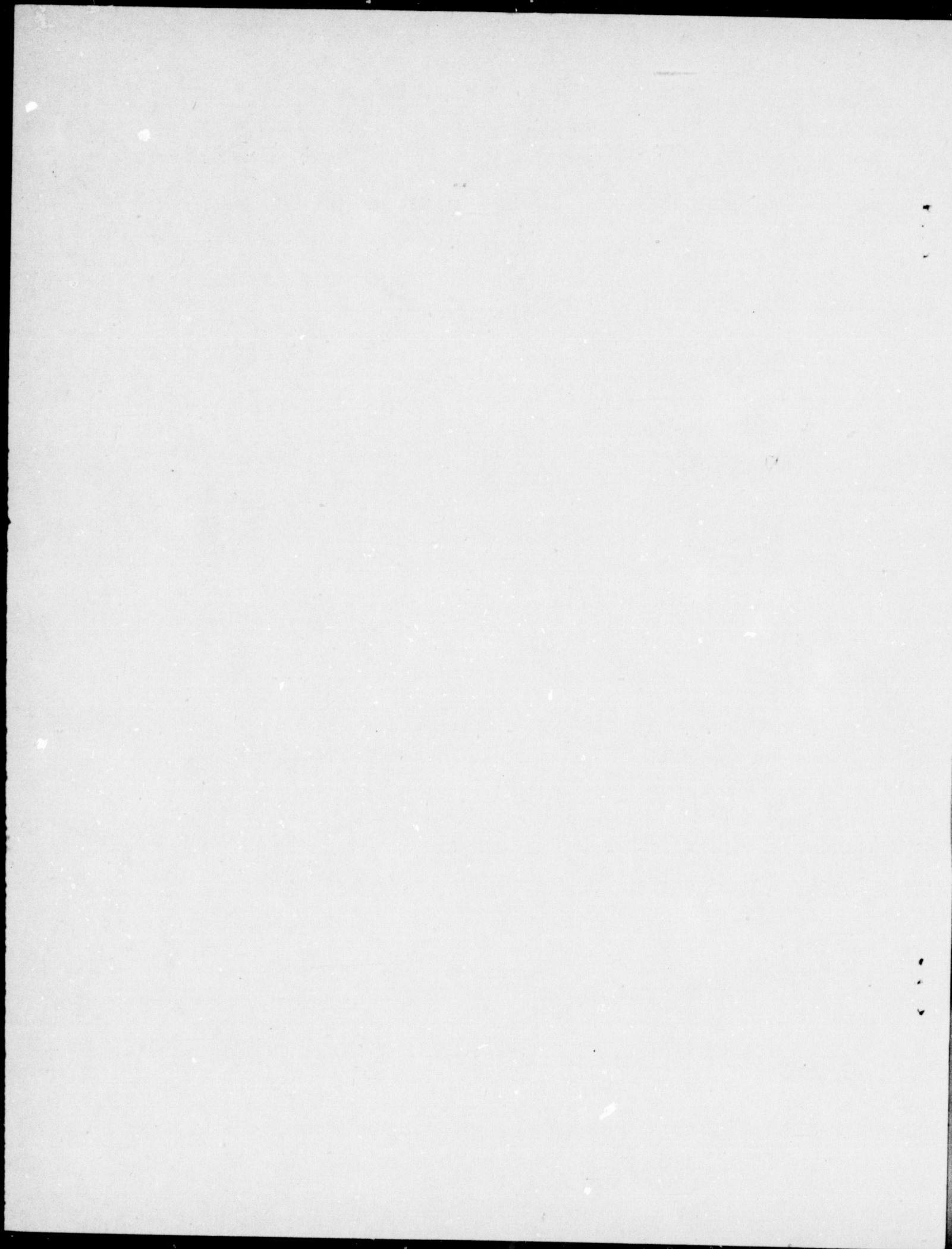
the danger [that the basic principle of the equal rights amendment would be undermined by permitting dual rights were unique characteristics are concerned] is increased by the possibility of evasion in the application of the subsidiary principle. Unless that principle is closely, directly, and narrowly confined to the unique physical characteristics, it could be used to justify laws that in overall effect seriously discriminate against one sex. A court faced with deciding whether a law relating to a unique physical characteristic was a subterfuge would look to a series of standards of relevance and necessity. These standards are the ones courts now consider when they are reviewing, under the doctrine of strict scrutiny, laws which may conflict with fundamental constitutional rights. 80. Yale L.J. 871, 894 (Emphasis added).

Thus, under the equal rights amendment, discrimination on the basis of a unique physical characteristic would be considered sex discrimination although the standard of review would, of necessity, be different than that applied to other sex-based classifications.

Emerson et al. provide, in their article, a detailed analysis of how the "subsidiary principle" would be applied to pregnancy rules. Focusing upon official regulations

requiring pregnant women to take a mandatory leave of absence from employment for specified periods of time before and after childbirth without job security, retention of accrued benefits or compensation (Emerson article, supra, 80 Yale L.J. 871, 929), the article concludes that such regulations would be invalid under the equal rights amendment. Id. at 932.

Thus, although the legislative history and possible interpretations of the equal rights amendment have no direct bearing on the question before this court, the Emerson rationale at least provides careful and detailed analysis of the issues presented here in another context. Amicus submits that the analysis, in the light of the purposes and scope of Title VII, discussed above is even more persuasive here.



### CONCLUSION

For the foregoing reasons this Court should hold that AT&T's denial of disability benefits to women disabled due to pregnancy-related disabilities violates Title VII of the Civil Rights Act of 1964, and should order AT&T to pay disability benefits to workers suffering pregnancy-related disabilities on the same basis as for all other disabilities.

Respectfully submitted,

Eve Cary  
New York Civil Liberties Union  
84 Fifth Avenue  
New York, N.Y. 10011

Attorney for Amicus Curiae

Of counsel

Ruth Bader Ginsburg  
Melvin L. Wulf  
Kathleen Peratis  
American Civil Liberties Union  
22 East 40th Street  
New York, N.Y. 10016

Wendy Webster Williams  
Equal Rights Advocates, Inc.  
433 Turk Street  
San Francisco, California 94102